

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOHNNIE L. WALKER

Claimant

VS.

UPS FREIGHT

Self-Insured Respondent

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Docket No. 1,030,832

ORDER

Respondent appealed the August 20, 2007, Preliminary Decision entered by Administrative Law Judge Robert H. Foerschler.

ISSUES

For preliminary hearing purposes, respondent does not challenge that on July 31, 2006, claimant fell at work and injured his low back and left leg. In addition, respondent does not challenge that claimant's accident arose out of and in the course of his employment.

In the August 20, 2007, Preliminary Decision, Judge Foerschler awarded claimant temporary total disability benefits. Among other facts, the Judge considered claimant's medical condition, his former job as a freight handler, and the fact he had been terminated by respondent.

Respondent contends Judge Foerschler erred as he has granted claimant temporary total disability benefits due to a hip condition, which is allegedly not related to the July 31, 2006, accident. Respondent asserts claimant has reached maximum medical improvement for his back injury and has been released to return to work without restrictions for that injury. Consequently, respondent argues claimant's back injury could not support an award of temporary total disability benefits. Consequently, respondent requests the Board to reverse the August 20, 2007, Preliminary Decision.

Conversely, claimant contends the Preliminary Decision should be affirmed. Claimant argues his injuries from the July 31, 2006, accident included his hips and lower extremities. Claimant also argues he was taken off work pending an MRI and that the doctor never contacted him following that MRI to discuss the results and that the doctor's

office would not return his telephone calls. In addition, claimant contends he never received any medical slip that released him to return to work.

The first issue to be determined on this appeal is whether the Board has jurisdiction to review the August 20, 2007, Preliminary Decision. If so, the second issue is whether the Judge erred by awarding claimant the temporary total disability benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds this claim should be remanded to the Judge for a finding that indicates whether claimant has been awarded temporary total disability benefits due to his low back injury or his alleged hip condition.

At the August 16, 2007, preliminary hearing, in opening comments respondent's attorney argued claimant was last taken off work for an MRI of his hips, which respondent contends are not related to claimant's accident at work.¹ Claimant testified he never complained to the doctors about his hips.² And in the August 20, 2007, Preliminary Decision, the Judge's analysis regarding claimant's entitlement to temporary total disability benefits did not address respondent's contention that claimant's hips were not related to the work-related accident. The Judge, instead, awarded claimant temporary total disability benefits after considering claimant's job skills and his termination. The August 20, 2007, Preliminary Decision reads in pertinent part:

It is always suspicious when an employer does not discharge an employee for cause until after he has a work injury, whatever maybe *[sic]* the original justification for it.

There are jobs in which the skills acquired permit to *[sic]* an employee to transfer to lighter work with another employer, but part time freight handling is not one of them. Further more *[sic]*, there is not [a] specific provision in our Act that requires an employer to provide it. Although sometimes this is helpful. These are strategies by which insurance can minimize losses, of no great advantage to the unrecovered worker or the personnel short employer, not to mention the resentment which can arise among co-workers.

It seems a reasonable resolution of this dispute is to recognize that the employer who terminates an employee while the latter is under treatment for a work injury, surrender its option to reduce expense later by offering accommodated work

¹ P.H. Trans. (Aug. 16, 2007) at 6.

² *Id.* at 26.

to the claimant, rather than transferring the task to claimant or some other employee.

For this reason the temporary total disability for claimant is ordered resumed as of June 4, 2007, the date of application and continued until a full release is provided by Dr. Pratt.³

The Board's jurisdiction to review preliminary hearing orders is limited. If the Judge has determined claimant satisfies the definition of being temporarily and totally disabled due to his low back injury, which respondent does not challenge as occurring as a result of the July 2006 accident, the Board does not have jurisdiction to review the August 20, 2007, Preliminary Decision.

On the other hand, if the Judge's decision to award claimant temporary total disability benefits is premised upon claimant's bilateral hip condition only, the Board would have jurisdiction to address the issue whether the hip complaints arose out of the July 2006 work-related accident. The record, however, does not indicate that issue has been addressed as it was only mentioned in respondent's attorney's opening comments at the August 2007 preliminary hearing and only addressed in Dr. Terrence Pratt's July 24, 2007, medical report, which claimant's attorney received one or two days before the August 16, 2007, preliminary hearing.

It is not readily apparent from the August 20, 2007, Preliminary Decision whether the Board has jurisdiction at this juncture to review that decision. Accordingly, this claim should be remanded to the Judge for further proceedings and findings that set forth whether the award of temporary total disability benefits is based upon the low back injury or hip injury. In the event the award is based upon the latter, the Judge should address the issue of whether the hip condition is somehow related to the July 2006 accident.

WHEREFORE, the undersigned remands this claim to the Judge for further findings or proceedings as the parties and Judge deem appropriate. The August 20, 2007, Preliminary Decision continues in full force and effect unless modified by the Judge in addressing this order of remand. The Board does not retain jurisdiction over this claim.

IT IS SO ORDERED.

³ ALJ Preliminary Decision (Aug. 20, 2007) at 2.

Dated this ____ day of November, 2007.

BOARD MEMBER

c: Robert W. Harris, Attorney for Claimant
Jeff S. Bloskey, Attorney for Respondent
Robert H. Foerschler, Administrative Law Judge